TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~456.~~ 219

OSCAR J. AVERELL, COLLECTOR OF INTERNAL REVENUE,
PLAINTIFF IN ERROR,

vs.

JARVIS R. SMITH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

FILED DECEMBER 2, 1871.

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INDEX.

	Original.	Print.
Plaintiff's costs as taxed	1	1
Petition to remove case from State court	9	4
Writ of certiorari	13	5
Return to writ of certiorari	15	6
Order to plead de novo	17	6
Declaration	18	6
Plea and notice of special matter	21	7
Order for judgment final	25	8
Judgment	27	9
Order granting leave for defendant to make case	29	9
Case	31	9
Special verdict	66	20
Writ of error	71	22
Citation of service	74	22
Bond	76	23
Clerk's certificate	80	24

1 United States circuit court, northern district of New York.

JARVIS R. SMITH
against
OSCAR J. AVERELL.

Plaintiff's costs.

Docket-fee		$20 00
For plaintiff's costs and disbursements in supreme court of New York State, from commencement of action up to the removal into this court. (Allowed by §307, Code N. Y.)	25 00	
P'd sheriff Chemung Co. for serving summons on def't.	1 00	
		26 00

DISBURSMENTS INCURRED AFTER REMOVAL.

P'd reporter for copy minutes of testimony at trial	$5 00	
P'd clerk of U. S. dis't court, for entering judg't in U. S. of A., v. J. R. Smith, for use as evidence on this trial	5 25	
Clerk of U. S. circ't c't, for filing narr. & entering-rule, .50, copy-rule, .50, & docketing case, for pl'ff, $1	2 00	
1 original & three copies subpœna	1 00	
Filing note of issue & entering on calendar	55	
Entering order & verdict 19 oaths	2 50	
2 Filing and entering rule for judg't & copies	85	
Final fee on taxation, &c	3 00	
Making judg't record, 32 folios, .15	4 80	
Certified copy of record	3 55	
Filing papers, & postage, &c	1 50	
		$30 00

Witness fees:

Daniel F. Brown, 1 day, 87 miles to, & 87 miles returning	10 20	
Charles G. Dennison, 1 day, 87 miles to, & 87 miles returning	10 20	
Silas D. Whitlock, 1 day, 87 miles to, & 87 miles returning	10 20	
Jarvis R. Smith, 1 day, & 87 miles to, & 87 miles returning	10 20	
		40 80
		$116 80

Interest about $36.10

(See below.)

Interest on verdict, from June 10th to Dec. 14th	40 40
	157 20

NORTHERN DISTRICT OF NEW YORK,
Monroe County, ss:

Martin W. Cooke, being sworn, says that he is one of the attorneys for the plaintiff in above-entitled suit, and that the disbursements
3 above-named have been or will be necessarily made or incurred

in this suit, to the best of deponent's knowledge & belief; that he paid the sheriff of Chemung Co. said $1, for serving summons herein in State court, and the item of $25, for costs in supreme court, are allowed, & were taxable to plaintiff at the time of the removal of this suit from said State court for all proceedings in said action prior to that time by the laws of the State of New York, as deponent understands them.

That the copy of reporter's minutes of the testimony herein was necessary, and was used by the court on the argument before the court herein of the question of law reserved herein.

That the computation of interest above was made by deponent, and it is on the am't of verdict from date of same to Dec. 18th, 1869, and is correct, as deponent believes.

MARTIN W. COOKE.

Sworn to before me this 10th day of December, 1869.

[L. S.] J. B. PERKINS,
Notary Public.

Amount brought down	$116 80
Deduct docketing case for pl'ff as an item premature, &c.	1 00
	$115 80
4 Add interest on verdict from June 18th to Dec. 14th, 5 m. 26 d'ys	34 72
	$150 52

I tax the above bill at one hundred and fifty $\frac{52}{100}$ dollars this 14th December, 1869.

A. A. BOYCE, *Clerk.*

(Indorsed:) U. S. circuit court, nor. d. of N. Y. Jarvis R. Smith v. A. J. Averell. Bill of costs. Church, Munger & Cooke, for pl'ff, Rochester, N. Y.

SIR: Please take notice that the bill of costs, of which the within is a copy, will be taxed before A. A. Boyce, esq., clerk of this court, at his office in Utica, on the 14th day of December, 1869, at 10 o'clock in the forenoon.

Dated Rochester, Dec. 7th, 1869.

Yours, &c.,

CHURCH, MUNGER & COOKE,
Pl'ff's Att'ys.

To W'M DORSHEIMER,
U. S. Att'y for Def't.

Service of a copy of within bill of costs and notice of taxation admitted this 8th day of December, 1869.

W'M DORSHEIMER,
Def't's Att'y.

5 United States circuit court, northern district of New York.

JARVIS R. SMITH
against
OSCAR J. AVERELL.

NORTHERN DISTRICT OF NEW YORK, *ss:*

Martin W. Cooke, of Rochester, being duly sworn, says that he is one of the attorneys for plaintiff in this action; that the several persons

hereinafter named attended the circuit court held at the court-house in the county of Ontario, at Canandaigua, commencing on the 15th day of June, 1869, as witnesses for the plaintiff in this action, the number of days hereinafter mentioned, and that they severally resided at the places and at the distances from the said court-house, also hereinafter mentioned respectively, as follows:

Daniel F. Brown, of Corning, county of Steuben, 1 day, 87 miles from the court-house of said county of Ontario.

Charles G. Denison, of Corning, county of Steuben, 1 day & 87 miles from the court-house of said county of Ontario.

Silas D. Whitlock, of Corning, county of Steuben, 1 day, 87 miles from the court-house of said county of Ontario.

Jarvis R. Smith, of Corning, county of Steuben, 1 day, 87 miles from the court-house of said county of Ontario.

6 That said Jarvis R. Smith attended as a witness in his own behalf; that he so attended at the request of deponent, as his counsel and solely as a witness; that deponent was his counsel herein, and regarded his attendance as such witness, as necessary, & that his testimony was material & necessary in this suit.

That each of said persons necessarily traveled the number of miles set opposite his name as above, in traveling to, and the same distance in returning from, said court-house or place of trial, and that each of said persons was a material witness for the said plaintiff on the trial of this action, and they each attended one day at said circuit court.

MARTIN W. COOKE.

Sworn before me, this 29 day of Oct'er, 1869.

W'M C. STORRS,
U. S. Comm'r North. Dist. N. York.

(Indorsed:) U. S. circuit court, nor. dist. of N. Y. Jarvis R. Smith ag't Oscar J. Averill. Aff't as to witnesses. Church, Munger & Cooke, pl'ff's att'ys, Rochester, N. Y. Filed Dec. 14, 1869.

7 Pleas before the judges of the circuit court of the United States of America in and for the northern district of New York, in the second circuit, of the March adjourned term of said court, A. D. 1869.

Witness, Hon. Nathan K. Hall, judge.

AUG'S A. BOYCE, *Clerk.*

NORTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that, heretofore, to wit, on the 25th day of January, A. D. 1869, a suit was commenced in the supreme court of the *United States* in the seventh judicial district, wherein Jarvis R. Smith was plaintiff, and Oscar J. Averell was defendant, which suit was commenced by service on said Oscar J. Averell of a summons and complaint. That said suit was brought against said Oscar J. Averell for and on account of the alleged unlawful taking and retaining from said Jarvis R. Smith certain goods, to wit, ten whiskey-barrels and four hundred and three and fifty-four one-hundredths gallons of whiskey, to recover the value of the same, said goods having been seized by said Oscar J. Averell,

8 a collector of the internal revenue in and for the 27th collection district of New York, as forfeited to the United States of America.

That, afterwards, and on the eighth day of February, A. D. 1869, the said Oscar J. Averell, as such collector of internal revenue, filed in the clerk's office of the circuit court of the United States in and for the north-

ern district of New York, his petition, praying that said cause be removed into said circuit court of the United States, according to the form of the statute in such case made and provided.

Whereupon a certiorari was issued in duplicate removing said cause as prayed in said petition, which said petition and certiorari and return thereon by the papers hereto annexed.

9 To the honorable the circuit court of the United States, held in and for the northern district of New York:

The petition of Oscar J. Averell, of Bath, in the county of Steuben, within said district, respectfully shows:

That your petitioner was at the various times hereinafter named, and is now an officer of the United States, to wit, the collector of internal revenue in and for the 27th collection district of New York.

That your petitioner was on the 25th day of January, 1869, personally served with a summons and complaint issued out of the supreme court of the State of New York, wherein one Jarvis R. Smith is named as plaintiff and your petitioner as defendant.

That said summons and complaint were served on petitioner within the said northern district of New York; that by such service a suit & prosecution has been commenced in the said supreme court of New York, against your petitioner; and that the grounds for such suit and prosecution, as stated in the complaint aforesaid, are that your petitioner did, on or about the 4th day of February, 1868, at Corning, in the State of New York, *did* take from the possession, (unlawfully, as alleged)

10 of the said plaintiff, Jarvis R. Smith, certain goods, to wit, ten whisky-barrels and 403 $\frac{54}{100}$ gallons of whiskey, and still detained the same from the possession of said Smith; that the taking and detention of such property from the possession of said Smith, was an act done by petitioner, as such officer of the United States, under the revenue laws thereof, and was a seizure made of such property on account of an alleged violation of the internal revenue laws of the United States by petitioner as collector aforesaid.

That an information was filed against such property so seized as aforesaid, in the district court of the United States in and for said district, and such proceedings were thereupon had, that a judgment of said court was finally rendered restoring such property to the claimant thereof, and that a certificate that there was probable cause for such seizure was thereupon granted by said court.

And your petitioner further states that the above are all the grounds upon which the said action was commenced against him.

And your petitioner therefore prays that the said action may be removed into the circuit court of the United States in and for the

11 northern district of New York, pursuant to the provisions of the statute in such case made and provided.

And your petitioner will ever pray, &c.

Dated February 4th, 1869.

O. J. AVERELL.

NORTHERN DISTRICT OF NEW YORK,
County of Steuben, ss:

Oscar J. Averill, of said county and district, being duly sworn, deposes aad says: That he is the petitioner named in the foregoing petition; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes the same to be true.

O. J. AVERELL.

Sworn before me this 4th day of February, 1869.

JAMES L. WOODS.
U. S. Com'r Nor. Dis't of N. Y.

NORTHERN DISTRICT OF NEW YORK, *ss:*

I, W'm Dorsheimer, do hereby certify that I reside at the city of Buffalo in said district; that I am a counsellor at law in the supreme court of the State of New York, and also in the district & circuit courts of the United States for the northern district of New York; that, as counsellor for the above-named petitioner, I have examined the proceedings against him, and have carefully inquired into all the matters set
12 forth in the foregoing petition, and that I believe the same to be true.

Dated Feb. 5, 1869.

WILLIAM DORSHEIMER,
Counsellor for Petitioner above named.

(Indorsed:) U. S. circuit court, north dis't of N. Y. Jarvis R. Smith vs. Oscar J. Averell. Petition of def't to remove cause from N. Y. supreme court. W'm Dorsheimer, U. S. att'y, for def't. Filed Feb'y 8, 1869.

13 The President of the United States of America to the supreme court of the State of New York in the 7th judicial district, greeting:

Being informed that there is now pending before you a suit in which Jarvis R. Smith is plaintiff, and Oscar J. Averell is defendant, which suit was commenced in said supreme court against the said Oscar J. Averell, for and on account of acts done by him under the revenue laws of the United States; that said suit was commenced by summons and complaint and that said suit has not been tried:

And we being willing, for certain reasons, that the said cause and the record and proceedings therein should be certified by the said court and removed into our circuit court of the United States in and for the northern district of New York, do hereby command you that you send without delay to the said circuit court as aforesaid, the record and proceedings in said cause, so that the said circuit court may act thereon, as of right and according to laws ought to be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at Albany, the third Tuesday
14 of January, A. D. 1869.

[L. S.] A. A. BOYCE, *Clerk.*

W'M DORSHEIMER, *Att'y for Pl'ff in Error.*

I hereby certify that, on the 20th day of February, A. D. 1869, at Rochester, in my district, I personally served the within writ on Charles J. Powers, county clerk of the county of Monroe, and clerk of the N. Y. supreme court for said county, in the 7th judicial district, by personally showing to him the same with the seal of the court thereon, and leaving with him a copy thereof.

Dated February 20th, 1869.

EDWARD DODD,
U. S. Marshal.
By E. J. KEENY, *Deputy.*

Service, $2; travel, 70 miles, *a* 6 c. per mile, $4.20.

(Indorsed:) U. S. circuit court, northern dist. of N. Y. Jar'is R. Smith, def't in error, vs. Oscar J. Averell, pl'ff in error. Certiorari. W'm Dorsheimer, att'y for pl'ff in error. Filed Feb'y 25th, 1869.

15 The return of Cha's J. Powers, county clerk of Monroe County, and clerk of the supreme court of the State of New York, to the writ of certiorari issued on the application of Oscar J. Averell, to remove into the circuit court of the United States for the northern district of New York, a certain action, wherein he is the defendant, and one Jarvis R. Smith is the plaintiff, heretofore pending in said supreme court.

By virtue of and in obedience to the said writ of certiorari, issued out of the circuit court of the United States of America for the northern district of New York, and to me directed and delivered, I do hereby certify and return to the said court that I do not find any papers, records, or pleadings on file in my office entitled in said action.

All of which I do hereby certify and return, as by said writ I am commanded.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Rochester, this 24th day of February, A. D. 1869.

[SEAL.] CHARLES J. POWERS, *Clerk.*

16 (Indorsed:) U. S. circuit court, northern district of N. Y. Jarvis R. Smith, def't in error, vs. Oscar J. Averell, pl'ff in error. Return to certiorari. Filed Feb'y 26, 1869.

17 And thereupon, on the 26th day of February, A. D. 1869, on the filing of the return of the said supreme court, William Dorsheimer, attorney for the said Oscar J. Averell, moved that a rule be entered requiring the defendant in error, Jarvis R. Smith, to file his pleadings de novo, which said rule is in these words and figures, to wit:

FEBRUARY 26, 1869.

JARVIS R. SMITH, DEF'T IN ERROR,
vs.
OSCAR J. AVERELL, PL'FF IN ERROR.

W'm Dorsheimer, att'y for pl'ff in error.

On filing return to the certiorari in this case, and on motion of W'm Dorsheimer, esq., attorney for plaintiff in error—

It is ordered that defendant in error plead de novo within twenty days after notice of the entry of this rule, or judgment, &c.

Whereupon, in pursuance of said rule, the defendant in error, Jarvis R. Smith, by Church, Munger and Cooke, esquires, his attorneys, did, on the 17th day of March, A. D. 1869, file in said circuit court his declaration against Oscar J. Averell, which declaration is in the words and figures following, to wit:

18 United States circuit court, northern district of New York, at March adjourned term in the year 1869, March 17th, 1869.

JARVIS R. SMITH, PL'FF,
against
OSCAR J. AVERELL, DEF'T.

Jarvis R. Smith, plaintiff in this suit, by Church, Munger & Cooke, his attorneys, in obedience to the writ of certiorari issued by this court,

& sued out and procured upon the petition of said Oscar J. Averell, defendant herein, & removing this cause from and out of the supreme court of the State of New York, wherein it was duly commenced by service of summons and complaint, into this court, & in obedience to the order of this court made and entered herein, that said plaintiff plead herein de novo, complains of said defendant for that the said defendant, on or about the 4th day of February, in the year one thousand eight hundred and sixty-eight, with force and arms, at Corning, in the State of New York, in said northern district of New York, seized,
took, and carried away certain goods & chattels, to wit, ten whis-
19 key barrels, & four hundred three & fifty-four one-hundredths gallons of whiskey, contained in the same, the property of the said plaintiff, of great value, to wit, of the value of eleven hundred thirty-four dollars & seventy-three cents, then there found & being, & converted & disposed of the same to his own use, and still unlawfully detains the same from the said plaintiff, & other wrongs to the said plaintiff then & there did, against the peace of the people of the State of New York, & to the damage of the said plaintiff of two thousand dollars; & therefore he brings this suit and demands judgment against the said defendant in the sum of two thousand dollars, besides the costs of this action.

CHURCH, MUNGER & COOKE,
Pl'ff's Attorneys.

Rochester, N. Y., M'ch 16, 1869.

20 (Indorsed:) U. S. circuit court, nor. dist. of N. Y. Jarvis R. Smith v. Oscar J. Averell. Declaration. Church, Munger & Cooke, pl'ff's att'ys. Rochester, N. Y. Filed March 17, 1869.

21 And, thereupon, on the 9th day of April, A. D. 1869, the said Oscar J. Averell, by William Dorsheimer, esquire, his attorney, comes into said court and files this his plea and notice of special matter.

United States circuit court, northern district of New York, of March adjourned term, 1869, to wit, of the third Tuesday of March, A. D. 1869.

JARVIS R. SMITH, PLAINTIFF,
vs.
OSCAR J. AVERELL, DEFENDANT.

And the said defendant, by William Dorsheimer, his attorney, comes and defends the wrong and injury when, &c., and says he is not guilty of the said supposed grievances above laid to his charge, or any or either of them, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against him. And of this he, the said defendant, puts himself upon the country, &c.

WILLIAM DORSHEIMER,
Attorney for Defendant.

22 GENTLEMEN: Please to take notice, that the said defendant at the trial of the above cause will insist upon and give in evidence under the general issue above pleaded, that the defendant was at all the times mentioned in the declaration herein, the collector of internal revenue in and for the 27th collection district of New York, duly appointed and qualified pursuant to the statutes of the United States,

and that the taking and carrying away, and detaining and conversion of property complained of in and by said declaration was done, if at all, by said defendant as such collector as aforesaid, in his official capacity and in the discharge of his duty as such collector, for violations of the laws of the United States, and in pursuance of the statutes of the United States authorizing the same—which is the same taking, carrying away, detaining, and conversion in said declaration alleged, and none other or different; that, subsequent to the seizure of the property in said declaration mentioned, and on or about the 27th day of April, 1868, an information was filed against the same by William Dorsheimer,
23 United States attorney for the said northern district of New York, in the office of the clerk of the district court of the United States, in and for said district, and that a claim and answer thereto was thereafter filed by said Jarvis R. Smith, the plaintiff herein, as claimant of said property; that such proceeding were thereafter had that, on or about the 21st day of August, 1868, at a stated session of said district court of the United States, held in and for said district, at the court-house in Buffalo, a trial was had and a judgment was rendered and entered at said term, directing the release of said property to the said claimant, Jarvis R. Smith, and that thereupon said property was released and returned to said Jarvis R. Smith, claimant; and that thereupon or thereafter a certificate and entry was granted and made by the said district court of the United States, being the court before whom the said prosecution against said property was tried; that there was reasonable and probable cause for such seizure so made by said defendant, Oscar J. Averell, as such collector as aforesaid, pursuant to the statute in such case made and provided.

Dated April 9th, 1869.

W'M DORSHEIMER,
Attorney for Defendant.

To Messrs. CHURCH, MUNGER & COOKE,
Attorneys for Plaintiff.

24 (Indorsed:) U. S. circuit court, north. dist. of N. Y. Jarvis R. Smith, plaintiff, vs. Oscar J. Averill, defendant. Plea and notice of special matter. W'm Dorsheimer, att'y for def't. Buffalo. Filed April 9, 1869.

25 And thereupon the issue above-joined came on to be tried at the June term, A. D. 1869, of said court, and the jurors summoned to try the said issue, being empannelled, tried, and sworn, after hearing the evidence offered in said cause, do say that they find a verdict in favor of the plaintiff, Jarvis R. Smith, of one thousand fourteen dollars and forty-six cents, subject to the opinion of the court upon the questions of law arising upon the proof of the certificate of probable cause, and upon the fact of the non return of the property so wrongfully seized, taken, and carried away by the said Oscar J. Averell.

And said cause was continued down to the October term of said circuit court, whereupon at the opening thereof, and on the 12th day of October, A. D. 1869, the following order was made, filed, and entered herein for judgment final for the plaintiff upon the verdict in his favor, rendered at the last June term of this court.

JARVIS R. SMITH
vs.
OSCAR J. AVERELL.

26 This cause having been brought to argument upon the verdict therein, and upon the question of law reserved at the trial, and

due deliberation had thereon, on motion of Mr. Cooke, for the plaintiff, ordered judgment final for the plaintiff upon the verdict in his favor rendered at the last June term of this court.

(Indorsed:) U. S. circuit court, northern dist. of N. Y. Jarvis R. Smith vs. Oscar J. Averell. Order for judgment. Final on verdict rendered at June term. Filed Oct. 12, 1869.

27 Therefore it is considered that the said Jarvis R. Smith, plaintiff, do recover against said Oscar J. Averell, his said damages of one thousand fourteen dollars and forty-six cents, besides his costs and charges in that behalf sustained, which are now here taxed at one hundred and fifty & $\frac{52}{100}$ dollars, and which said damages, costs, and charges, in the aggregate, amount to one thousand one hundred and sixty-four and $\frac{98}{100}$ dollars. And said defendant in mercy, &c.

Judgment signed this 14th day of December, A. D. 1869.

A. A. BOYCE, *Clerk.*

28 (Indorsed:) United States circuit court, northern district of New York. Jarvis R. Smith versus Oscar J. Averill. Judgment record. Church, Munger & Cooke, plaintiff's attorneys. Damages, $1,014.46; taxed costs, $150.52—$1,164.98. Docketed Dec. 14, 1869, 12 o'clock m. Filed Dec. 14, 1869.

29 At an adjourned term of the circuit court of the United States of America for the northern district of New York, in the second circuit, held at the city of Utica, on Saturday, the 26th day of March, in the year of our Lord one thousand eight hundred and seventy.

Present the Honorable Lewis B. Woodruff, judge.

JARVIS R. SMITH
versus.
OSCAR J. AVERELL.

A motion having been heretofore argued in this cause for leave to defendants to make a case, by Mr. Cooke, of counsel for plaintiff, and Mr. Dorsheimer, of counsel for defendant, and due deliberation having been had thereon, it is now here, on motion of Mr. Dorsheimer, of counsel for defendant, ordered that the defendant have leave to make a formal case, and when settled, file the same nunc pro tunc, as of the term of June, 1869.

(A copy as entered.)

Witness my hand and official seal at Utica, this 26th day of March, 1870.

30 (Indorsed:) U. S. circuit court, north. dist. of New York. Jarvis R. Smith vs. Oscar J. Averell. Order. Leave to deft. to make a case. Filed March 26, 1870.

31 At a term of the United States circuit court for the northern district of New York, in the village of Canandaigua, on the eighteenth day of June, A. D. 1869.

JARVIS R. SMITH
vs.
OSCAR J. AVERELL.

Issue having been joined in the above-entitled action, the same was brought to trial at said term of said court, on the eighteenth day of

June, A. D. 1869, before the Hon. Nathan K. Hall, United States district judge for the northern district of New York, holding the said circuit court, and a jury duly impaneled and sworn to try the said issue, and thereupon, to maintain the issues on his part the plaintiff gave in evidence, the following admissions, which were duly made by the defendant's counsel:

First. That this action was commenced in January, 1869.

Second. That, on or about the fourth day of February, 1868, the defendant, in this action, seized, at Corning, in this State, the property in this suit—403 $\frac{54}{100}$ gallons of whiskey, contained in 9 of 10 barrels,
32 which were also seized.

Third. That the same was carried away and deposited in a warehouse.

Fourth. That it was seized by the defendant in the capacity of collector of internal revenues, but against the will and without the consent of the plaintiff.

Fifth. That the property was in the possession of the plaintiff at the time of the seizure.

Sixth. That there was an information filed against the property in question.

Seventh. That a claim and answer for this property was put in by Jarvis R. Smith, the present plaintiff, as claimant of the property.

Eighth. That such proceedings were thereafter taken, that, on or about the 21st of August, 1868, at a stated session of the district court, at the court-house in Buffalo, the trial was had and a judgment was rendered and entered at said term, for said claimant, and directing the release of said property to said claimant, Jarvis R. Smith.

(See page 22–26.)

And, to further maintain the issues, on his part, the plaintiff
33 called, as a witness, JARVIS R. SMITH, who, being duly sworn, said:

I am the plaintiff in this action; reside at Corning. My business is that of a liquor dealer; been in the business at Corning two or two and a half years; been in same business at Batavia. I remember the whiskey and the barrels which are the subject of this action. I owned that whiskey on or about the 4th of February, 1868. I remember the fact of its seizure. I owned it up to the time of that seizure. I claimed it afterwards. It was in my possession up to the time of the seizure. There were ten barrels. There were nine barrels had whiskey in them when removed. There were 403 $\frac{54}{100}$ proof gallons of whiskey. The whiskey was worth $2.50 at that time. I paid $2.25 for it; the barrels were worth from $1.50 to $2. They were not worth $2 apiece, in my opinion. I would say $1.75. I have not seen that whiskey since. It has never been returned to me; neither have the barrels, nor any of them; no offer has been made to return them to me.

Cross-examination:

34 I paid $2.25 per gallon—proof gallon—never bought whiskey in any other way. I think I paid for 473 gallons and a fraction. I said there were 403 because I used a barrel, and part of another before it was seized. I did not pay for 473 wine-gallons of spirits. They were shipped to me as 473 proof-gallons. I used these spirits before the officer had taken them into custody. I used a barrel and a half before. I used it before the seizure. This whiskey was worth $2.50 p'r gallon. I could not state the market price of whiskey at that time. I am a whiskey dealer. I do not know (only from reports) that the market

price was less than $2.50 at that time. I know that it was so reported in the prices current in the newspapers. I could not tell from my recollection at that time what was the market-price.

Direct-ex'n:

(Admitted that it was against the law to sell whiskey for less than the tax.)

Whiskey was worth $2.50 at Corning.

Re-cross:

35 I knew of sales of spirits at $2.50. I could not now say to whom without referring to my books. In quantities from one gallon to forty gallons. That was rectified spirits. None sold above proof—proof gallons. Could not say how old it was. It was not considered very old spirits, nor very new. I, myself, sold one or two barrels or more, at that time; sold them to bars, and drinking places some, and to retail dealers. I didn't sell any to wholesale dealers. I did not pay as high as $2.50. The highest price I paid at that time for whiskey was $2.25. This whiskey was as high as any other. To my recollection I did not, about that time, purchase whiskey as low as $2. I do not know as I did as low as $2.05. I do not know as I have stated that I bought spirits at that time for $2.05. I cannot remember whether I made such a statement or not. I cannot remember anything about it; it is sometime ago. I was the sole owner of that whiskey. Nobody else had an interest in the ownership. Mr. Whitlock had an interest in the profits, he
36 was partner in the profits of the goods. At the time of the seizure I was the owner of the property; had not paid over the money. I have seen Mr. Barber. I was not present at the trial of the information case. I was sick and unable to be there. I do not know that Mr. Henderson appeared and claimed to be the owner of the property.

By Mr. COOKE:

I became liable to pay for this whiskey.
It is paid for now.

By Mr. DORSHEIMER:

I paid for it part before, and part after it was released.

DANIEL F. BROWN, being also called, testified as follows:

I reside at Corning. I resided there in 1868. I remember the whiskey and barrels which are the subject of this action. I took that whiskey from the store of the plaintiff and stored it. I received a letter from the office of Averell in reference to that whiskey, and directing me to take it and store it. I think I have that letter.

(Admitted by defendants counsel, that witness took the whiskey and put it in the storehouse of Mr. Dennison at Corning, under Mr. Averell's directions.)

37 CHARLES G. DENNISON, being also called, testified as follows:

I reside at Corning. I am in the ware-house and commission business. I remember Mr. Brown's delivering some whiskey there in February, 1868. There were ten barrels, 9 with liquor in. I have held that liquor ever since; also the barrels. Nobody has been there to take possession of it. I have charges against Mr. Averell for holding that whiskey and the barrels.

Cross-examination:

The United States marshal did not notify me that he had taken possession of that whiskey. I never had any word from anybody but Brown.

I can tell you just the conversation between me and Mr. Brown. He did not tell me that the United States marshal had taken possession of it; he came over and asked me if I could store some liquors and barrels, and what my charges would be. I told him I could. He said he would send me over some, and did, and I have had it ever since. I have never heard anything about it since. Collector Averell never came to me about it.

Re-direct:

I knew that Mr. Brown was deputy asses'or.

38 SILAS D. WHITLOCK, being also called, testified as follows:

I reside at Corning. My business is selling liquor; been in that business good many years. I know the value of whiskey in February, 1868, and along there. I know this whiskey which is the subject of this action. I considered it worth $2.50. The value of the barrels was from $1.50 to $2. I would say $1.75 was a fair price for them. Since this whiskey has been seized, it has been at Dennison's, I suppose. I have seen it there. I had an interest in the profits of the concern. I bought all the goods. I made the contract for this liquor. I demanded it of Dennison, and he refused to give it up to me. This whiskey has never been returned, to my knowledge.

Cross-examination:

I said I considered this whiskey worth $2.50 per gallon; it was not quoted at that time in the papers at $2.50. I think I had paid as high as $2.50—I think as high as $3. That was Bourbon whiskey. I paid as high as $2.50 for this description of spirits; could not tell to whom without referring to the bills.

The plaintiff here rested.

39 And to maintain the issues on his part, the defendant called, as a witness, MILLARD P. FILLMORE, who, being duly sworn, said:

The paper now shown me is the record in the case. I suppose it is correctly made up.

The defendant's counsel here offered in evidence the following record:

"District court of the United States, northern district of New York.

"Pleas in the district court of the United States of America for the northern district of New York, held at the city of Buffalo, of the term of May, in the year of our Lord one thousand eight hundred and sixty-eight, before the Honorable Nathan K. Hall, judge of the said court.

"M. P. FILLMORE, *Clerk.*

"NORTHERN DISTRICT OF NEW YORK, *ss:*

"Be it remembered that, heretofore, to wit, on the twenty-seventh day of April, 1868, at a special session of the district court of the
40 United States of America for the northern district of New York, held at the city of Buffalo, in the said district, before the Honorable Nathan K. Hall, judge of the said court, came the United States of America, by William Dorsheimer, esquire, their attorney, and brought into said court their certain information against ten barrels of whiskey, which said information is in the following words, to wit:

"District court of the United States of America for the northern district of New York.

"At a special session of the district court of the United States of America for the northern district of New York, begun and held at the United States court-buildings, in the city of Buffalo, in the State of New York, in the said northern district, before the judge of the same court, on the twenty-seventh day of April, in the year one thousand eight hundred and sixty-eight, comes William Dorsheimer, attorney of the United States for the said northern district of New York, who prosecutes for the said United States in this behalf, and, being present here in court in his own proper person and the name and on behalf of the said United States, alleges, informs, and declares as follows, to wit:

"That O. J. Averell, collector of internal revenue for the
41 twenty-seventh district of the State of New York, heretofore, to wit, on the fourth day of February, in the year one thousand eight hundred and sixty-eight, on land at Corning, in the said twenty-seventh collection district of the State of New York, within the northern district of New York, and within the jurisdiction of this court, seized, as forfeited to the use of the United States, the following described goods, wares, and merchandises, articles and objects, that is to say, ten barrels of whiskey, the same being distilled spirits, and now holds the same in his care, custody, and possession, at Corning aforesaid, in said northern district of New York, within the jurisdiction of this court, as forfeited for the causes hereinafter set forth:

42 "That upon the said whiskey and distilled spirits, such goods, wares, and merchandise, articles and objects, as aforesaid, duties and taxes are imposed by the provisions of the fourteenth section of the act of Congress, approved March 2nd, 1867, entitled *an* "An act to amend existing laws relating to internal revenue, and for other purposes," and the several amendments thereto.

"That the said goods, wares, and merchandise, articles and objects, then and there being so subject to the payment of duties and taxes as aforesaid, were found by the said O. J. Averell, such collector as aforesaid, in the possession and custody and within the control of J. R. Smith, for the purpose of being sold by him, in fraud of the said internal revenue laws, and with design to avoid the payment of such duties and taxes, against the forty-eighth section of the act of Congress, entitled "An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes," approved June 30th, 1864, and the acts amendatory thereof.

"That the said goods, wares, and merchandise, articles and
43 objects, then and there being so subject to the payment of duties and taxes as aforesaid, were found by the said O. J. Averill, such collector as aforesaid, in the possession and custody and within the control of J. R. Smith, for the purpose of being removed by him, in fraud of the internal revenue laws of the United States, and with design to avoid the payment of such duties and taxes, against the forty-eighth section of the act of Congress last mentioned and the acts amending the same.

"Second. And also, for that the aforesaid goods, wares, and merchandise, articles and objects, whiskey and distilled spirits, being liable to duty and tax under and pursuant to the statute aforesaid, were found and seized at Corning, in the said 27th collection district of the State of New York, within the northern district of New York, and

within the jurisdiction of this court, by the said O. J. Averill, esq., as such collector as aforesaid, on the fourth day of February, A. D. 1868; that the said whiskey and distilled spirits were so found elsewhere than in a bonded warehouse, and having been by one A. S. Saul there-
44 tofore, and on or about the 24th day of January, A. D. 1868, sold and offered for sale at a less price than the tax imposed by law thereon, to one J. R. Smith, contrary to the provisions of the statute in such case made and provided, and against the twenty first section of the act of Congress, approved March 2d, 1867, entitled 'An act to amend existing laws' relating to internal revenue, and for other purposes.'

"Third. For that the aforesaid goods, wares, and merchandise, articles and objects, whiskey and distilled spirits, were liable to taxation under and pursuant to the statutes in such case made and provided, and the said whiskey and distilled spirits were so as aforesaid found and seized at Corning, in the 27th collection district of the State of New York, in the northern district of New York, and within the jurisdiction of this court, by the said O. J. Averill, as such collector, on the 4th day of February, A. D. 1868, the said distilled spirits having been made, manufactured, and distilled at some place, at some time, and by some person or persons to the said The United States and their
45 attorney unknown, and the same were thereafter, and before the time of the finding and seizure thereof as aforesaid, by some person or persons to the said The United States and their said attorney unknown, removed from the place where the same were distilled otherwise than into a bonded warehouse, as provided by law; and the said whiskey and distilled spirits were, by the said O. J. Averill, said collector as aforesaid, found and seized at the time and place aforesaid, the said whiskey and distilled spirits being so found elsewhere than in a bonded warehouse, not having been removed from such warehouse according to law, and the tax imposed by law upon the same not having been paid, in fraud of the internal revenue laws, and against the provisions of the forty-fifth section of the act of Congress entitled 'An act to reduce the internal taxation,' and to amend an act entitled 'An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purpose', approved June thirtieth, eighteen hundred and sixty-four, 'and the acts amendatory thereof,' approved July 13, A. D. 1866.

46 "And the said attorney of the United States, on behalf of the said United States, saith that, by reason of all and singular the premises aforesaid, and by force of the statute in such case made and provided, the aforementioned and described goods, wares, and merchandise became and are forfeited to the use of the said United States.

"And that all and singular the premises aforesaid are and were true, public, and notorious, of which due proof being made, the said attorney prays the usual process and monition of this honorable court in this behalf to be made, and that all person or persons interested in the beforementioned and described goods, wares, and merchandise may be cited in general and special to answer the premises, and, all due proceedings being had thereon, that the said goods, wares, and merchandise may, for the causes aforesaid, and others appearing, be condemned, by the definite sentence and decree of this honorable court, as forfeited to the use of the said United States, according to the form of the statutes of the United States in such cases made and provided.

47 "And thereupon, in pursuance of the prayer of the said information, and of an order of the said court in accordance there-

with, a process of attachment & monition was issued herein, returnable on the 19th day of May, 1868.

"And on the said return-day, that is to say, on the 19th day of May, 1868, at the city of Rochester, in the northern district of New York, comes William Dorsheimer, esq., the attorney of the said United States, in and for the northern district of New York, who prosecutes for the said United States of America in this behalf, and Edward Dodd, esq., the marshal of the said district, being present here in court in his own proper person, makes return of the process of attachment & monition awarded as aforesaid, and to him directed & delivered, pursuant to the prayer aforesaid, and to the statute in such case made and provided, with a report thereon, endorsed in the words and figures following, that is to say:

"In obedience to the within writ, I did, on the fourth day of
48 May, 1868, at Corning, seize and attach the within-mentioned property, & I have duly cited all persons to appear and assert their claims, as I am within commanded.

"EDWARD DODD, *Marshal*,
"By WILLIAM D. COVELL, *Deputy*.

"Dated Elmira, May 18, 1868.

"Which said process, together with the said return, are now on file & entered of record in the said court.

"Hereupon comes Jarvis R. Smith into court here, by Church, Munger & Cooke, esq'r's, his attorneys, and doth allege & make claim that he is the true and bona-fide owner of the said property in the information mentioned, and hereupon he is admitted as claimant and defendant in the said action, and files his claim and answer in the words and figures following:

"United States district court, northern district of New York.

49 "THE UNITED STATES
"*vs.*
"TEN BARRELS OF WHISKEY. } No. 267.

"The claim and answer of Jarvis R. Smith, owner and claimant of said Ten Barrels of Whiskey, to the libel of information of O. J. Averill, collector, &c., in behalf of the United States, against the said Ten Barrels of Whiskey.

"And now comes Jarvis R. Smith, of Corning, New York, owner of said Ten Barrels of Whiskey, and for answer to the libel of said O. J. Averill, in behalf of the United States against the said Ten Barrels of Whiskey, doth allege and propound as follows, to wit:

"First. That he, the said Jarvis R. Smith, is the true and bona-fide owner of said Ten Barrels of Whiskey, and that no other person is the owner thereof.

"Second. That it is true that said O. J. Averill, in said libel named, did seize the said Ten Barrels of Whiskey, and now holds the same in custody at the place mentioned in said libel; that it is true that
50 upon whiskey and distilled spirits duties & taxes are imposed by the act mentioned in said libel, but this claimant alleges and propounds, upon information and belief, that it is not true that said Ten Barrels of Whiskey were subject to such duties and taxes as is alleged, when found and seized by said O. J. Averill, & that all the duties and taxes which ought to have been paid upon said Ten Barrels of Whiskey

within the jurisdiction of this court, by the said O. J. Averill, esq., as such collector as aforesaid, on the fourth day of February, A. D. 1868; that the said whiskey and distilled spirits were so found elsewhere than in a bonded warehouse, and having been by one A. S. Saul there-
44 tofore, and on or about the 24th day of January, A. D. 1868, sold and offered for sale at a less price than the tax imposed by law thereon, to one J. R. Smith, contrary to the provisions of the statute in such case made and provided, and against the twenty first section of the act of Congress, approved March 2d, 1867, entitled 'An act to amend existing laws relating to internal revenue, and for other purposes.'

"Third. For that the aforesaid goods, wares, and merchandise, articles and objects, whiskey and distilled spirits, were liable to taxation under and pursuant to the statutes in such case made and provided, and the said whiskey and distilled spirits were so as aforesaid found and seized at Corning, in the 27th collection district of the State of New York, in the northern district of New York, and within the jurisdiction of this court, by the said O. J. Averill, as such collector, on the 4th day of February, A. D. 1868, the said distilled spirits having been made, manufactured, and distilled at some place, at some time, and by some person or persons to the said The United States and their
45 attorney unknown, and the same were thereafter, and before the time of the finding and seizure thereof as aforesaid, by some person or persons to the said The United States and their said attorney unknown, removed from the place where the same were distilled otherwise than into a bonded warehouse, as provided by law; and the said whiskey and distilled spirits were, by the said O. J. Averill, said collector as aforesaid, found and seized at the time and place aforesaid, the said whiskey and distilled spirits being so found elsewhere than in a bonded warehouse, not having been removed from such warehouse according to law, and the tax imposed by law upon the same not having been paid, in fraud of the internal revenue laws, and against the provisions of the forty-fifth section of the act of Congress entitled 'An act to reduce the internal taxation,' and to amend an act entitled 'An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purpose', approved June thirtieth, eighteen hundred and sixty-four, 'and the acts amendatory thereof,' approved July 13, A. D. 1866.

46 "And the said attorney of the United States, on behalf of the said United States, saith that, by reason of all and singular the premises aforesaid, and by force of the statute in such case made and provided, the aforementioned and described goods, wares, and merchandise became and are forfeited to the use of the said United States.

"And that all and singular the premises aforesaid are and were true, public, and notorious, of which due proof being made, the said attorney prays the usual process and monition of this honorable court in this behalf to be made, and that all person or persons interested in the beforementioned and described goods, wares, and merchandise may be cited in general and special to answer the premises, and, all due proceedings being had thereon, that the said goods, wares, and merchandise may, for the causes aforesaid, and others appearing, be condemned, by the definite sentence and decree of this honorable court, as forfeited to the use of the said United States, according to the form of the statutes of the United States in such cases made and provided.

47 "And thereupon, in pursuance of the prayer of the said information, and of an order of the said court in accordance there-

with, a process of attachment & monition was issued herein, returnable on the 19th day of May, 1868.

"And on the said return-day, that is to say, on the 19th day of May, 1868, at the city of Rochester, in the northern district of New York, comes William Dorsheimer, esq., the attorney of the said United States, in and for the northern district of New York, who prosecutes for the said United States of America in this behalf, and Edward Dodd, esq., the marshal of the said district, being present here in court in his own proper person, makes return of the process of attachment & monition awarded as aforesaid, and to him directed & delivered, pursuant to the prayer aforesaid, and to the statute in such case made and provided, with a report thereon, endorsed in the words and figures following, that is to say:

"In obedience to the within writ, I did, on the fourth day of
48 May, 1868, at Corning, seize and attach the within-mentioned property, & I have duly cited all persons to appear and assert their claims, as I am within commanded.

"EDWARD DODD, *Marshal*,
"By WILLIAM D. COVELL, *Deputy*.

"Dated Elmira, May 18, 1868.

"Which said process, together with the said return, are now on file & entered of record in the said court.

"Hereupon comes Jarvis R. Smith into court here, by Church, Munger & Cooke, esq'r's, his attorneys, and doth allege & make claim that he is the true and bona-fide owner of the said property in the information mentioned, and hereupon he is admitted as claimant and defendant in the said action, and files his claim and answer in the words and figures following:

"United States district court, northern district of New York.

49 "THE UNITED STATES
"*vs.* } No. 267.
"TEN BARRELS OF WHISKEY.

"The claim and answer of Jarvis R. Smith, owner and claimant of said Ten Barrels of Whiskey, to the libel of information of O. J. Averill, collector, &c., in behalf of the United States, against the said Ten Barrels of Whiskey.

"And now comes Jarvis R. Smith, of Corning, New York, owner of said Ten Barrels of Whiskey, and for answer to the libel of said O. J. Averill, in behalf of the United States against the said Ten Barrels of Whiskey, doth allege and propound as follows, to wit:

"First. That he, the said Jarvis R. Smith, is the true and bona-fide owner of said Ten Barrels of Whiskey, and that no other person is the owner thereof.

"Second. That it is true that said O. J. Averill, in said libel named, did seize the said Ten Barrels of Whiskey, and now holds the same in custody at the place mentioned in said libel; that it is true that
50 upon whiskey and distilled spirits duties & taxes are imposed by the act mentioned in said libel, but this claimant alleges and propounds, upon information and belief, that it is not true that said Ten Barrels of Whiskey were subject to such duties and taxes as is alleged, when found and seized by said O. J. Averill, & that all the duties and taxes which ought to have been paid upon said Ten Barrels of Whiskey

in accordance with the several statutes mentioned in said libel, were duly paid, and that no part of said Ten Barrels of Whiskey was liable for any tax or duty to the United States at the time of said seizure, or has since that time.

"That it is not true that said Ten Barrels of Whiskey were at that time, or ever were, in the possession or custody, or within the control of this claimant for the purpose of being sold by him, or for the purpose of being removed by him, in fraud of said internal revenue laws, or with design to avoid the payment of said duties or taxes, as is pleaded and alleged in said libel.

"Third. That it is not true that said Ten Barrels of Whiskey
51 were, on or about the 24th day of January, A. D. 1868, or were, at any other time, sold or offered for sale at a less price than the tax imposed by law thereon by A. S. Saul, or by any other person, to this claimant, as is alleged and pleaded in said libel.

"Fourth. This claimant alleges and propounds, upon information and belief, that it is not true that the said Ten Barrels of Whiskey were removed from the place where the same were distilled otherwise than into a bonded warehouse; that it is not true that said ten barrels of whiskey were removed from a bonded warehouse not according to law; that it is not true that the tax imposed by law upon the same was not paid; but this claimant alleges & propounds, upon like information & belief, that all the tax imposed by law upon said Ten Barrels of Whiskey was duly paid, and all the provisions of the internal revenue laws in regard to the same were fully complied with.

"Fifth. That each and every allegation of fraud, illegal intent to avoid the payment of the tax upon the said ten barrels of whiskey, on the part of this claimant, and each and every allegation of
52 any of the statutes mentioned in said libel, and each and every allegation in said libel contained, not herein admitted, are false and untrue.

"Sixth. That all and singular the premises are true.

"Wherefore this claimant & respondent prays that the said ten barrels of whiskey may be restored to him.

"On the fifth day of June, 1868, appeared personally, Jarvis R. Smith, the above-named claimant & respondent, & was sworn to the truth of the foregoing claim and answer, before me.

"JAMES L. WOODS,
"*U. S. Commissioner, Nor. Dist. of N. Y.*

"And the said attorney of the United States, by way of replication to the said plea and answer of the said Jarvis R. Smith, doth aver that the matters in the said plea and answer are not true in fact, and
53 sufficient in law to bar the forfeiture aforesaid, and the matters contained in the information are true in fact and sufficient in law to maintain a decree of forfeiture, according to the prayer thereof. Of all of which matters he is ready to make due proof, as the court shall direct; and thereupon as well the said claimant as the said United States, put themselves upon the country upon the issues above joined.

"Therefore, let a jury thereupon come before the court aforesaid, at the United States court-room in Buffalo, in the said northern district of New York, on the 3d Tuesday of August, 1868, of the term of August, by whom, &c., and who neither, &c., to recognize, &c., because as well, &c., the same day is given to the parties aforesaid, at the same place. At which term & place came as well the United States of America, by

William Darsheimer, esq., their attorney aforesaid, as the said Jarvis R. Smith, claimant, by Church, Munger, & Cooke, esq'r's, his attorneys, and the jurors of the jury whereof mention is made, being summoned, also come, and the said jurors of the jury, being elected, tried, and sworn, say upon their oaths that the said Ten Barrels of Whiskey
54 did not become forfeited as in the said information alleged, and that the same is the property of the said Jarvis R. Smith.

"And the said United States having made application to the said court, at the last-mentioned term, for a certificate of probable cause of seizure, and because the said court now here is not yet advised what judgment to give of and upon the premises, therefore the process thereof is continued between the parties aforesaid of the plea aforesaid in this same court, before the judge thereof, until the 3d Tuesday of November, of the term of November, 1868, at the court-house in the city of Auburn, in said district, and the same day is given to the parties aforesaid, at the same place, to hear the judgment of the said court thereupon.

"At which last-mentioned term before the said judge come as well the United States of America, by their attorney aforesaid, as the said claimant, by his said attorney.

55 "Therefore it is considered, and the said court doth adjudge that the said property did not become forfeited as in the said information alleged, & that the same is the property of Jarvis R. Smith, the said claimant, & that the same be discharged; and the court doth further adjudge & certify that there was probable cause for the seizue of such property.

"Judgment signed this 12th day of June, 1869.

"M. P. FILLMORE, *Clerk.*

"(Endorsed:) Filed June 12, 1869."

56

57 The counsel for the defendant here called attention to the fact that the judgment of the district court does not direct the release to the claimant of the property, and said that he was mistaken in his admission in that respect, and desired to correct it to that extent. (See p. 2.)

The defendant's counsel also offered in evidence the following record:

"At a stated session of the district court of the United States of America for the northern district of New York, held at the city of Auburn, on the 18th day of November, A. D. 1869.

"Present, Hon. Nathan K. Hall, district judge.

"THE U. S. OF AMERICA
"*vs.*
"10 BBLS. OF WHISKEY. } Certificate of probable cause.

"A motion having been made at a former stated session of this court by the United States attorney for a certificate of probable cause of seizure, and Mr. Dorsheimer, U. S. attorney, having been heard in
58 support of such motion, and Mr. Cooke, of counsel for said claimant, in opposition hereto, and due deliberation having been had thereon, the court now here doth hereby order, adjudge, and certify that there was probable cause for the seizure of the property mentioned and described in the information herein."

OSCAR C. AVERILL, the defendant herein, being also duly sworn, said:

I am the collector of internal revenue at Elmira. I made the seizure of the 10 barrels of whiskey spoken of. It was taken in possession by the marshal. It has not been in my possession since he showed me the order for taking possession of it. This was the 15th or 20th of May, 1868. Never have seen or heard of it since. Jarvis R. Smith has never made any claim of me except by bringing this action; has never spoke to me since about it. As to the market value of whiskey at Corning, at the time of this seizure, I knew nothing of my own knowledge. I know what it was stated. I was frequently making inquiries as to what liquors were being sold for. It was my business to find out what
59 was the market value. I considered myself toler'bly well posted what liquors was selling for.

By the COURT:

I acquired a knowledge from agents and persons passing through, and I looked at reports in commercial papers.

By Mr. DORSHEIMER:

I should not regard that liquor, under any circumstances, worth more, according to what it was selling for, than $2.05 a gallon. At that time, in Corning, this kind of spirits was worth $2.05. That was what it was selling for by everybody.

Cross-examination:

I saw the barrels; didn't see the whiskey. I know good whiskey from bad. Can tell something of the proof of whiskey by tasting of it. I have tasted of whiskey that was 16 or 17 above proof. Never was in the liquor business. I only know from talking with dealers what was the market value of spirits. I never talked with dealers in regard to this particular grade of whiskey. I do not know how much above proof this whiskey was.

By the COURT:

I speak of the price per proof gallon.

By Mr. COOKE:

60 William D. Covell was deputy marshal at that time. He lives at Elmira. I never saw this whiskey after it was seized. I know where it was taken. I think he showed me there some order directing him to take possession of it, and he did take possession of it on the day he showed me the order. I did not issue a warrant at the time I seized that whiskey. I had already taken possession of it in person myself. I did not issue any warrant. I intend to be understood to say that I delivered this property to the marshal from the 15th to the 20th. I don't remember the date. He did not tell me he had seized it. He showed me his order directing him to take possession of this property, and directing me, I think, to turn it over to him.

By the COURT:

I mean by that order the process of the court.

The testimony was here closed.

It was conceded by the defendant's counsel that no part of the property had been returned to the plaintiff, and that no claim was made by the defendant that it had in any way been returned. At the suggestion of the court, the counsel for the respective parties consented that

61 the value of the property should be assessed by the jury, and that they render a general verdict for the plaintiff for the value so assessed, subject to the opinion of the court upon the questions of law arising upon the proof of the certificate of probable cause, and upon the fact of the non-return of the property.

Thereupon the jury assessed the value of the property in question at $1,014.46, and rendered a verdict for the plaintiff for that amount, damages, which verdict was thereupon entered, as follows:

"The jury here, under instructions from the court, and in charge of a sworn bailiff, retire, and afterwards come into court, and, being called, answer and say they find a verdict in favor of the plaintiff for $1,014.46, subject to the opinion of the court upon the questions of law arising upon the proof of the certificate of probable cause, and upon the fact of the non-return of the property."

The foregoing case is settled and signed by the judge who tried the cause, and on the application of the defendant's counsel, under the special rule or order of the circuit court made March 26, 1870; but the plaintiff' counsel having, in writing, claimed that the case proposed under said order was abandoned, this case is settled and signed without
62 prejudice to the rights of either of the parties to take any objections thereto, or make any motion in respect to the same.

Buffalo, Nov. 7, 1870.

N. K. HALL, [L. S.]

(Indorsed:) U. S. circuit court, north. dist. of N. York. Jarvis R. Smith vs. Oscar J. Averill. Case. Filed Nov. 9, 1870.

63 Circuit court of the United States for the northern district of New York.

JARVIS R. SMITH
vs.
OSCAR J. AVERELL.

The issues, so as aforesaid joined herein, came on to be tried on the 18th of June, 1869, before the Honorable Nathan K. Hall, district judge (holding the said circuit court,) and a jury; and the proofs of the parties being given, at the suggestion of the court the counsel of the respective parties consented that the value of the property in the declaration herein mentioned, should be assessed by the jury, and that they render a general verdict for the plaintiff for the value so assessed, subject to the opinion of the court upon the questions of law arising upon the proof of a certificate of probable cause and upon the fact of the non-return of the property. And thereupon the jury rendered their verdict, which was duly entered as follows, to wit:

"The jury here, under instructions from the court, and in charge of a sworn bailiff, retire, and afterwards come into court, and, being
64 called, answer and say they find a verdict in favor of the plaintiff for $1,014.46, subject to the opinion of the court upon the questions of law arising upon the proof of the certificate of probable cause, and upon the fact of the non-return of the property."

And the questions aforesaid being considered by the said district judge upon his minutes of the said trial, and the written briefs of the counsel for the plaintiff and defendant, afterwards, on the twelfth day of October, 1869, in the term of October, judgment was directed by the said judge to be entered for the said plaintiff, & thereupon, on that

day, by rule duly entered, judgment for the plaintiff was ordered by said court upon the verdict aforesaid; and on the fourteenth day of December, 1869, in the vacation after the said term, the formal record of such judgment for the said plaintiff, upon the said verdict, was filed in the office of the clerk of the said court.

Whereupon at a term of the said circuit court held at Albany, on the third Tuesday of January, 1870, a motion was duly made by the defendant that such judgment be vacated, and that the plaintiff be required to make a case containing the evidence, and bring the questions
65 reserved as aforesaid to argument before the said court according to the rules and practice thereof. Upon which said motion the said court, on the third Tuesday of March, 1870, to which the said term was adjourned, ordered that the defendant have leave to make a formal case, and file the same nunc pro tunc as of the term of June, 1869.

And thereafter, at a term of the said court held on the third Tuesday of June, 1870, the said defendant made further application to the said court, whereupon, on hearing counsel for the parties, and at a term of the said court held on the second Tuesday of October, 1870, by an order of the said court duly made herein, leave was given to the said defendant to turn the said case into a special verdict, to be filed nunc pro tunc, and annexed to the record herein.

And, thereupon, such special verdict is, by order of the said court and on the defendant's motion, settled and directed to be filed nunc pro tunc, as of the term of October, 1869, and annexed to the record herein, in manner and form following, that is to say:

Circuit court of the United States for the northern district of New York.

66 *Special verdict.*

JARVIS R. SMITH
vs.
OSCAR J. AVERELL.

Afterwards, that is to say, at a term of the said court held at the court-house in the village of Canandaigua, on the eighteenth day of June, A. D. 1869, before the Honorable Nathan K. Hall, district judge of the United States in and for said district, holding said circuit court and a jury—the aforesaid issue so joined between the said parties, as aforesaid, came on to be tried. At which day came as well the said plaintiff as the said defendant, by their respective attorneys aforesaid, and the jurors of the jury aforesaid, empannelled to try the said issue, being called, also came, who, to speak the truth of the matters within contained being chosen, tried and sworn, said upon their oaths:

That said action was commenced in January, 1869; that, on or about the fourth day of February, A. D. 1868, at Corning, in said district, the said defendant being then and there a collector of internal revenue of the United States, seized, as forfeited to the United States, and took, carried away, and deposited in a certain storehouse at Corning
67 aforesaid, ten barrels and 403 $\frac{54}{100}$ gallons of whiskey contained in nine of said barrels, the same then and there being in the possession of and owned by said plaintiff; that an information was filed against said property in the United States district court for said district; that, on or about the 15th or 20th day of May, A. D. 1868, Wil-

liam D. Covell, a deputy of the marshal of said district, presented to said defendant a process of said district court, commanding him, said marshal, to seize said property; that said marshal*l* did make return to said district court; that, on the 4th day of May, A. D. 1868, he did seize and attach said property, and had duly cited all persons to appear and assert their claims thereto, but that said marshal did not, at any time, notify the person having possession of, and in whose warehouse the said barrels and whiskey were stored by said defendant, that he, the said marshal*l*, had taken possession thereof; that a claim and answer to said property was put in by Jarvis R. Smith, said plaintiff, as owner and claimant thereof; that such proceedings were thereafter taken that, on or about the 21st day of August, A. D. 1868, at a stated session of said district court held at Buffalo, a trial was had, and a judgment was rendered and entered at said session that said
68 property did not become forfeited to the United States as in said information alleged, but that the same belonged to said Jarvis R. Smith, said plaintiff; that afterwards, and on or about the 18th day of November, 1868, at Auburn, the said district court adjudged and certified that there was probable cause for the said seizure of said property; that said plaintiff has never made claim of said defendant for said property, except by bringing said action, neither has said property or any part thereof ever been returned to said plaintiff, or has any offer been made to return the same or any portion thereof, but that the same still remains in such storehouse at Corning aforesaid. But whether or no, upon the whole matter aforesaid, by the jurors aforesaid, in form aforesaid found, the said defendant is guilty of the matters within laid to his charge, the jurors aforesaid are altogether ignorant, and thereupon pray the advice of said circuit court before the said district judge holding the same. And if, upon the whole matters aforesaid, it shall seem to the said court that the said defendant is guilty of unlawfully taking, carrying away, and detaining the within-described property from said plaintiff, then the jurors aforesaid, upon their
69 oaths aforesaid, say that the said defendant is guilty thereof in manner in form as the said plaintiff hath within thereof complained against him; and in that case they assess the damages of the said plaintiff, by reason of the matters aforesaid, besides his costs and charges by him about his suit in that behalf expended, to one thousand and fourteen dollars and forty-six cents, ($1,014.46.)

But if, upon the whole matter aforesaid, it shall seem to the said court that the said defendant is not guilty of the matters aforesaid, and that he did not unlawfully take, carry away, and detain the within-described property from said plaintiff, then the jurors aforesaid, upon their oaths aforesaid, say that the said defendant is not guilty thereof in manner and form as he hath within in pleading alleged, and that he did not unlawfully take, carry away, and detain the within-described property from said plaintiff.

The above form of a special verdict is settled upon and adopted as a correct statement of the material facts upon which judgment for the plaintiff was directed and ordered at the October term, 1869.

N. K. HALL.

70 (Indorsed:) Circuit court of the United States for the northern district of New York. Jarvis R. Smith v. Oscar J. Averell. Special verdict. Filed June 22, 1871.

71 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the northern district of New York, greeting:

Because, in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Jarvis R. Smith and Oscar J. Averell, a manifest error hath happened to the great damage of the said Oscar J. Averell, as by his complaint appears: And we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the first Monday of December, A. D. 1871, in the said Supreme Court to be then and there held, that, the records and proceedings aforesaid being inspected, the said Su-
72 preme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at the city of Washington, the first Monday of December, A. D., 1870.

[SEAL.] CHARLES MASON,
Clerk of the Circuit Court of the United States for the Northern District of New York.

(Indorsed:) Supreme Court of the United States. Jarvis R. Smith, def't in error, vs. Oscar J. Averell, pl'ff in error. Writ of error to the U. S. circuit court for the north. dist. of N. York.

73 Allowed July 25th, 1871.
L. B. WOODRUFF, *Circuit Judge.*

Filed August 1, 1871.

74 UNITED STATES OF AMERICA, *ss:*

To JARVIS R. SMITH, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December, A. D. 1871, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of New York, wherein Oscar J. Averell is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 25th day of July, A. D. 1871.

L. B. WOODRUFF,
Circuit Judge of the United States for the Second Circuit.

75 NORTHERN DISTRICT OF NEW YORK, *ss:*

Elisha J. Keeney, of Rochester, in said district, being duly sworn, says that, on the first day of August, A. D. 1871, at Rochester aforesaid, he personally served the within citation on Martin W. Cooke, one of the attorneys for the within-named Jarvis R. Smith, by showing to him the

same, and at the same time delivering to him a true copy thereof; and that deponent knows said Martin W. Cooke to be in fact one of the attorneys for said Jarvis R. Smith in within suit.

E. J. KEENEY.

Subscribed and sworn to, Aug't 1st, 1871, before me.

W'M C. STORRS,
U. S. Comm'r, Northern Dist., N. Y.

(Indorsed:) Supreme Court of the United States. Jarvis R. Smith, def't in error, vs. Oscar J. Averell, pl'ff in error. Citation, returnable 1st Monday Dec., 1871, at Washington. Filed August 3, 1871.

76 Supreme Court of the United States.

OSCAR J. AVERELL, PL'FF IN ERROR,
ads.
JARVIS R. SMITH, DEF'T IN ERROR.

[$1.00 stamp, cancelled.]

Know all men by these presents that we, Oscar J. Averell, of Bath, in the county of Steuben, and State of New York, Henry H. Hull, of Bath, in the county of Steuben, and State of New York, and Henry Faucett, of Bath, in the county of Steuben, and State of New York, are held and firmly bound unto Jarvis R. Smith, in the sum of two thousand three hundred and sixty-five dollars, ($2,365,) lawful money of the United States of America, to be paid to the said Jarvis R. Smith, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this thirteenth day of July, A. D. 1871.

77 Whereas the above-named Oscar J. Averell, plaintiff in error in above-entitled action, hath prosecuted a writ of error to the circuit court of the United States, which said writ has been issued out of the Supreme Court of the United States, to reverse the judgment rendered in said action by said circuit court:

Now, therefore, the condition of this obligation is such, that if the above-named Oscar J. Averell shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

O. J. AVERELL. [SEAL.]
H. H. HULL. [SEAL.]
HENRY FAUCETT. [SEAL.]

Sealed and delivered in the presence of—
H. M. BRUSH.

NORTHERN DISTRICT OF NEW YORK,
County of Steuben, ss:

On this 13th day of July, A. D. 1871, personally before me Oscar J. Averell, to me known, and acknowledged that he signed and
78 executed the foregoing bond for the uses and purposes therein stated.

[SEAL.]

W. W. ALLEN,
Notary Public.

NORTHERN DISTRICT OF NEW YORK,
County of Chemung, ss:

On this 13th day of July, A. D. 1871, personally appeared before me Henry H. Hull and Henry Faucett, to me known, and acknowledged that they and each of them signed and executed the foregoing bond, for the uses and purposes therein stated. And the said Henry H. Hull, being duly sworn, saith that he is a freeholder residing in the town of Bath, in the county of Steuben, in said district, and is worth the sum of two thousand five hundred dollars, over and above all his debts and liabilities, in property not exempt from execution. And the said Henry Faucett, being duly sworn, saith that he is a freeholder residing in the town of Bath, in the county of Steuben, in said district, and is worth the sum of twenty-five hundred dollars, over and above all his debts and liabilities, in property not exempt from execution.

Acknowledged and sworn to, July 13, 1871, before me.

[SEAL.[W. W. ALLEN,
Notary Public.

79 (Indorsed:) Supreme Court of the United States. Oscar J. Averell, pl'ff in error, ads. Jarvis R. Smith, def't in error. Bond on appeal.

I approve of the sureties in the within bond. July 25, '71.
L. B. WOODRUFF,
Circuit Judge.

Filed August 1, 1871.

80 UNITED STATES OF AMERICA,
Northern District of New York, ss:

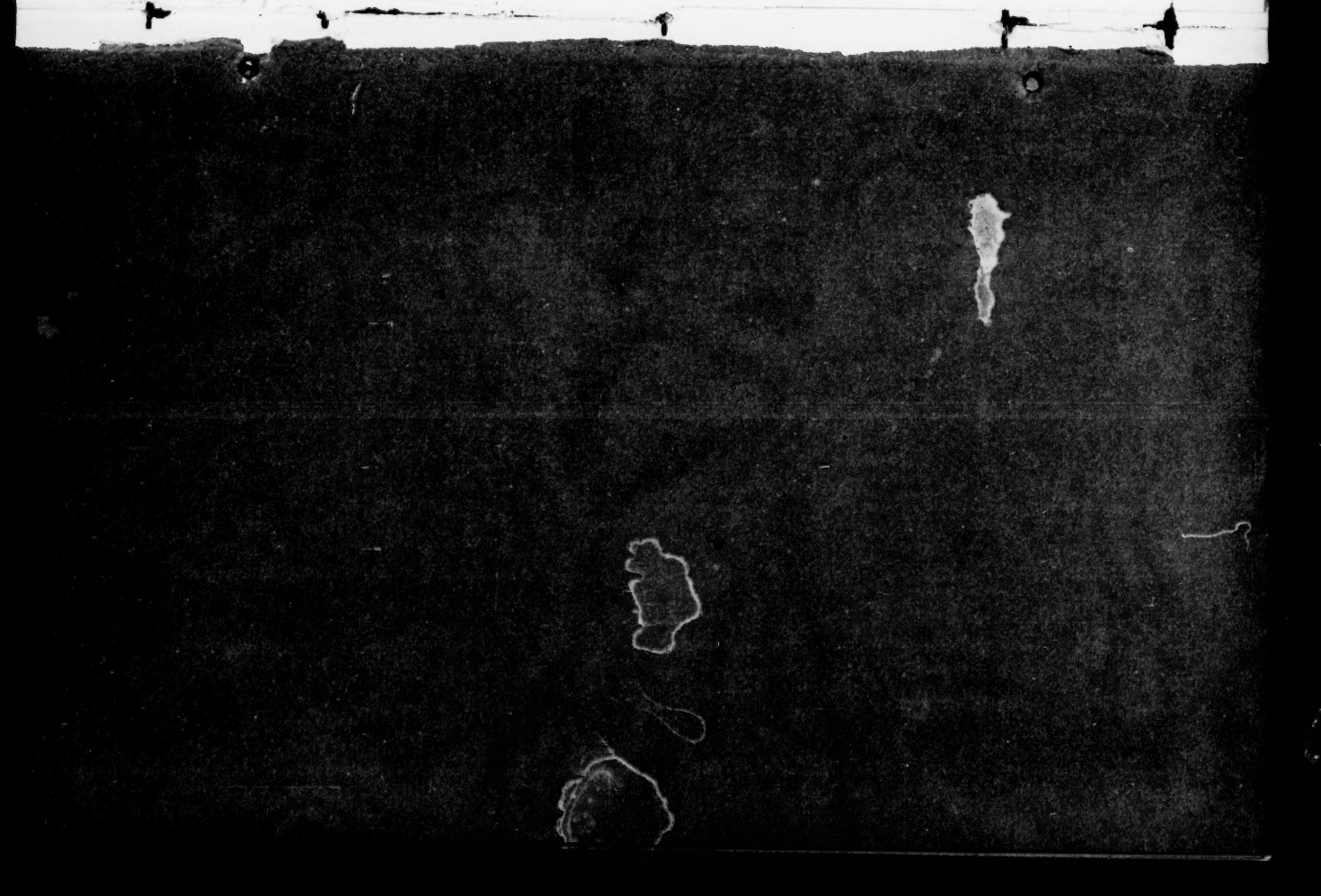
I, Charles Mason, clerk of the circuit court of the United States of America for the northern district of New York, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom now on file and remaining of record in my office, being a full and complete copy of the record and proceedings in the suit of Jarvis R. Smith vs. Oscar J. Averell.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Utica, in said district, this 22d day of November, A. D. 1871.

[SEAL.] CHARLES MASON, *Clerk.*

(Indorsement on cover:) No. 456. Oscar J. Averell, collector of internal revenue, plaintiff in error, vs. Jarvis R. Smith. N. New York C. C. U. S. Filed 2nd December, 1871.

Supreme Court of the United States. Oscar J. Averell, plaintiff in error, vs. Jarvis R. Smith, defendant in error. Transcript of record.



In the Supreme Court of the United States

DECEMBER TERM, 1872.

OSCAR J. AVERILL, *Collector of Internal Revenue, Plaintiff in Error,*
vs.
JARVIS R. SMITH.

No. 219.

In error to the Circuit Court of the United States for the Northern District of New York.

ARGUMENT FOR THE PLAINTIFF IN ERROR.

In the Supreme Court of the United States.

DECEMBER TERM, 1872.

OSCAR J. AVERILL, *Collector of Internal Revenue, Plaintiff in Error,*
vs.
JARVIS R. SMITH.

No. 219.

In error to the Circuit Court of the United States for the Northern District of New York.

ARGUMENT FOR THE PLAINTIFF IN ERROR.

STATEMENT.

Trespass against a collector of internal revenue, for taking and carrying away certain barrels of whiskey.

The defendant pleaded not guilty, and gave notice, under the practice of the second circuit, of the defences that he would set up.

The case was tried, and a verdict taken for the plaintiff, and judgment entered thereon, subject to the plaintiff's right to make a case in the form of a special verdict.

The material parts of said special verdict are as follows:

"The said defendant, being then and there a collector of internal revenue of the United States, seized, as forfeited to the United States, and took, carried away, and deposited in a certain storehouse at Corning aforesaid, ten barrels and $403\frac{54}{100}$ gallons of whiskey

contained in nine of said barrels, the same then and there being in the possession of and owned by said plaintiff; that an information was filed against said property in the United States district court for said district; that, on or about the 15th or 20th day of May, A. D. 1868, William D. Covell, a deputy of the marshal of said district, presented to said defendant a process of said district court, commanding him, said marshal, to seize said property; that said marshal did make return to said district court; that, on the 4th day of May, A. D. 1868, he did seize and attach said property, and had duly cited all persons to appear and assert their claims thereto, but that said marshal did not, at any time, notify the person having possession of, and in whose warehouse the said barrels and whiskey were stored by said defendant; that he, the said marshal, had taken possession thereof; that a claim and answer to said property was put in by Jarvis R. Smith, said plaintiff, as owner and claimant thereof; that such proceedings were thereafter taken; that, on or about the 21st day of August, A. D. 1868, at a stated session of said district court, held at Buffalo, a trial was had, and a judgment was rendered and entered at said session, that said property did not become forfeited to the United States as in said information alleged, but that the same belonged to said Jarvis R. Smith, said plaintiff; that afterwards, on or about the 18th day of November, 1868, at Auburn, the said district court adjudged and certified that there was probable cause for the said seizure of said property; that said plaintiff has never made claim of said defendant for said property except by bringing said action; neither has said property, or any part thereof, ever been returned to said plaintiff, nor has any offer been made to return the same or any portion thereof, but that the same still remains in such storehouse at Corning aforesaid."

Record, pp. 20, 21.

From this judgment the defendant prosecuted this writ of error.

ASSIGNMENT OF ERROR.

Upon the facts shown by the special verdict, an action of trespass will not lie against the defendant.

ARGUMENT.

1. The form in which this case comes up to the court is in accordance with the practice of the second circuit, and falls within the rules settled by the case of Suydam *vs.* Williamson, 20 How., 427.

2. The second resolution in the Six Carpenters' case, 8 Rep., 146, S. C., 1 Smith's Leading Cases, 216, was "that not doing cannot make the party who has the authority or license by the law a trespasser *ab initio*, because not doing is no trespass; and, therefore, if the lessor distrains for his rent, and thereupon the lessee tenders him the rent in arrear, &c., and requires his beasts again, and he will not deliver them, this not doing cannot make him a trespasser *ab initio*." This principle has been universally recognized. In West *vs.* Nibbs, 4 C. B., 172, it was held "that a landlord who has accepted the rent in arrear, and the expenses of the distress, after the impounding, cannot be treated as a trespasser merely because he retains possession of the goods distrained, although his refusal to deliver them up to the tenant may amount to a conversion so as to render him liable in trover." Chief Justice Wilde said, (pages 183, 184,) "My present impression certainly is, that trespass will not lie for the mere detention of goods: the goods being in the custody of the law, the distrainor is under no legal obligation actively to redeliver them;

the owner must take due means to repossess himself of them." So, in Gardner *vs.* Campbell, 15 Johns., 401, it was decided that a person taking the goods of another under lawful authority does not become a trespasser *ab initio* by refusing to redeliver them after his authority to detain the goods is determined. To the same effect is Ferrin *vs.* Symonds, 11 N. H., 363, where it was held that where an officer, having in his possession a writ of attachment for service, entered upon the land of the defendant in the action, for the purpose of attaching his goods there situate, and took and carried away the same goods and deposited them in a place in the open air, but in which they were in no danger of injury except from malice or wantonness, and a portion of the same were afterwards destroyed by some person unknown; he did not thereby become a trespasser *ab initio*. To the same effect are all the authorities. Jacobson *vs.* Blake, 6 Man. & Gr., 918, 924, 925; Smith *vs.* Egginton, 7 Ad. & El., 167; Waterbury *vs.* Lockwood, 4 Day, 257; 2 Greenl. Ev., § 615; 3 Bl. Com., 213; 2 Smith's Leading Cases, *ubi supra*, and cases there collected.

These cases are decisive of the present one. The certificate of probable cause given by the district judge showed that the original seizure of the goods was lawful and threw the *onus probandi* upon the claimants. There was an omission, too, in the judgment of the district court to make any order in respect of the return of the goods. But whatever effect this may have had upon the rights of the parties on the judgment in the district court, it became the duty of the

owner to take active measures to recover his property; and, without deciding whether he has a remedy in trover or replevin, it is clear on the preceding authorities that the present action will not lie.

GEO. H. WILLIAMS,
Attorney General.
C. H. HILL,
Asst. Attorney General.

IN THE

Supreme Court

OF THE

UNITED STATES.

DECEMBER TERM,

1872.

OSCAR J. AVERILL,
Plaintiff in Error,

vs.

JARVIS R. SMITH,
Defendant in Error.

ARGUMENT FOR DEFENDANT IN ERROR.

MARTIN W. COOKE,
Rochester, N. Y.,
For Defendant in Error.

ROCHESTER, N. Y.:
DEMOCRAT AND CHRONICLE PRINT, 3 WEST MAIN STREET.

Supreme Court of the United States.

OSCAR J. AVERILL,
Plaintiff in Error,
vs.
JARVIS R. SMITH,
Defendant in Error.

No. 219.

POINTS AND BRIEF FOR DEFENDANT IN ERROR.

In 1868 said Averill took and carried away said Smith's property; an information was filed by the U. S. District Attorney in the District Court for the Northern District of New York; said Smith claimed said property in said Court, and judgment was rendered and entered in his favor at the August Term, 1868, (page 21,) and said Court granted a certificate of probable cause, under Act of February 24, 1807, (page 21.)

In January, 1869, this action was commenced, (pages 4, 20.) The suit was in trover for taking and carrying away said goods, &c., (page 7.)

The defendant (Averill) pleaded said certificate in bar, alleging that said property had been *returned*, &c., (page 8.)

The suit was tried in June, 1869; plaintiff had verdict, subject to opinion of the Court, and at October Term, 1869, judgment was ordered for said Smith on the verdict, (page 9:) and judgment entered December 14th, 1869, (page 9.)

It appeared that the property had not been returned in June, 1869—nearly a year after judgment in District Court, (page 21.)

In March, 1870, the Circuit Court, on defendant's (Averill) motion to set aside the judgment, the Court allowed defendant to make a case herein, (pages 9 and 20.)

In October, 1870, the Court granted said Averill leave to turn said case into a special verdict, (page 20.) This was about a year after judgment was entered, (page 20.)

It appears that a paper headed "Special Verdict," (page 20,) was filed June 22, 1871, (page 21,) together with an introduction, (commencing in middle of page 19,) and concluding as follows:

"The above form of special verdict is settled upon and adopted [by "the Court or Judge] as a correct statement of the material facts upon "which judgment was directed and ordered at the October Term, 1869.

"(Signed,) N. K. HALL."

The defendant below sued out a writ of error; allowed July 25th, 1871; filed August 1, 1871, (page 22,)

There are no exceptions in the case.

If there was any error prejudicial to the defendant below, it was the decision of the Court directing judgment for the plaintiff on the verdict.

If the Court find that that decision is properly presented here for review by the proceedings of the Court after judgment, the defendant in error respectfully submits the following:

POINT I.

The decision of the Circuit Court, that the certificate of probable cause did not constitute a bar in this case, was correct.

The fact that the goods were not returned forthwith after judgment in the action in which the certificate was granted, rendered the certificate ineffectual as a bar to this action.

See Act of February 24th, 1807.
Hoyt vs. Hook, 14 Mass., Rep. 210.

That the goods were taken and carried away by defendant below, and that his liability was fixed unless he was protected by the certificate, was alleged, proved and conceded.

Judgment for said Smith, as the claimant in the District Court, was rendered and entered at the August Term, 1868, (page 21).

This action was commenced in January, 1869, (five months after said judgment), (page 20).

The goods had not been returned at the time of trial, June 1869, (page 21).

These facts under said statute rendered the certificate of no effect as a defence.

The able opinion of the Court upon the decision of this suit, presents a full discussion of the questions raised by the counsel for the defendant below.

The argument, that the Marshal ought to have returned the property, is answered in the opinion. Said opinion is therefore presented without further discussion. It might be said in addition, however, as to claim in regard to the Marshal's duty, that this suit was for taking and carrying away, and not for negligence in failing to return the goods.

VOL. X, No. 20, LAW REPORTS, INT. REV., REC. NOV. 13,'69.

U. S. CIRCUIT COURT—N. D. OF NEW YORK.

Property was seized by a Collector of Internal Revenue for an alleged violation of Internal Revenue Laws, was libelled for forfeiture in the U. S. District Court, the cause tried, verdict given for the claimant, and certificate of probable cause granted. Claimant sued the Collector to recover the value of the property so seized, and never returned to him.

Held, He is entitled to recover. Certificate of probable cause is no defence in such action unless the Collector shall have forthwith returned the seized goods to the claimant.

Although the Marshal had returned the property as attached, it is nevertheless not his duty but that of the Collector to see that the same is surrendered to the claimant.

JARVIS R. SMITH,
vs.
OSCAR J. AVERILL.

HALL, J.—This is a suit brought against the defendant to recover the value of property seized by him, as a Collector of Internal Revenue, for an alleged violation of the Internal Revenue Act.

The question of forfeiture was tried in the District Court, upon an information founded upon such seizure, and a verdict was found for the present plaintiff, who appeared as claimant in that proceeding; and

thereupon a certificate of probable cause was granted by that court. The property seized was placed in a warehouse, by the defendant's direction, soon after the seizure; and it still remained there at the time of the trial in this court.

The judgment of the District Court was that the property had not been forfeited, and that it should be discharged, but it was conceded that it had never been returned to the claimant, the present plaintiff, who was proved to be the lawful owner of all the property so seized.

The warehouseman, who held the property seized, testified on the trial that he still held the same; that no one had been there to take possession of it; that he had charges against the defendant for holding and storing such property; that the U. S. Marshal had never notified him that he had taken possession of the same; and that he had had no notice from any one of such possession by the Marshal.

The defendant testified that the property was taken in possession by the Marshal, who showed him the order for taking possession of it in May, 1868, and that he had never heard of or seen it since; but the other proofs showed that it had remained in the warehouse, where it was placed by the defendant's order, down to the time of the trial, and had never been removed by the Marshal, if he ever took, or attempted to take formal possession of the same. On the cross-examination of the defendant he stated that he never saw the property after it was seized.

The Marshal's return to the warrant of arrest and monition stated that he had attached the property and given the proper notices; but the proof showed that he had not removed it from the warehouse where it was deposited by the defendant's order; and there was no proof that he had in any way interfered with the possession of the property by the warehouseman, as the bailee of the defendant. It will, however, be assumed, for the purposes of the present controversy, that the return of the Marshal is conclusive; and that either by the endorsement and delivery to him of the warehouse receipt for the property, or otherwise, he had properly executed his process, and afterwards held the property under legal arrest until it was discharged by the judgment of the District Court; or else that it was so held by the Collector after the Marshal's seizure, as the legal custodian under the act of Congress.

A verdict was taken for the plaintiff, subject to the opinion of the Court; and the counsel for the respective parties have submitted the case upon their written briefs.

The important question now to be determined, is whether the certificate of reasonable cause, granted by the District Court, is a good defence to this action; as the property seized was never returned, or offered to be returned to the owner.

In a case of municipal seizure, like that complained of in this case, probable and reasonable cause is no defence, except where some statute creates and defines the exemption from damages. (*The Apollon*, 9 Wheaton, 362, 373;) but in prize cases, the captors, if there be probable cause, are entitled, as of right, to an exemption from damages, (ibid. 372, 373;) and, therefore, decisions made in prize cases are of no authority in respect to the present question, which depends entirely upon the construction of the acts of Congress.

In this case the exemption from damages is claimed under the first section of the act of the 24th of February, 1807; and the 89th section

of the Custom's Act of 1799, and each of these contains a provision that the property seized must be returned. The provisions of these sections, in respect to the question now presented, are substantially the same; and that contained in the act of 1807, reads as follows: "That when any prosecution shall be commenced on account of the seizure of any ship or vessel, goods, wares, or merchandise, made by any collector or other officer, under any act of Congress, authorizing such seizure, and judgment shall be given for the claimant or claimants, if it shall appear to the court before whom such prosecution shall be tried, that there was a reasonable cause of seizure, the said court shall cause a proper certificate or entry to be made thereof; and in such case the claimant or claimants shall not be entitled to costs, nor shall the person who made the seizure, or the prosecutor, be liable to action, suit or judgment on account of such seizure and prosecution; *Provided, that the ship or vessel, goods, wares, or merchandise, be, after judgment, forthwith returned to such claimant or claimants, his, her, or their agent or agents.*"

It was insisted by the plaintiff's counsel that, under this section and provision, the certificate of reasonable cause was no defence, because the property had not been returned; and he cited in support of his position the case of (*Hoit vs. Hook*, 14 Mass. Rep., 210,) decided in the Supreme Judicial Court of Massachusetts, by Chief Justice Parker, and Justices Thatcher, Putnam and Wild, in 1817.

The property in controversy in that case had been seized and libeled and then sold, *pendente lite*, under the order of the U. S. District Court. After it had been sold the cause was tried, and Hoit, the plaintiff, as the then claimant, had a verdict. The District Judge thereupon decreed that the property was not liable to forfeiture; that there was reasonable cause for the seizure; that $384.43 for the expenses which has been incurred for the custody and sustenance of the cattle seized should be deducted from the proceeds of sale; and that the residue, $151.57, should be paid to the claimant.

A verdict having been taken for the plaintiff in the State Court, subject to the opinion of that Court, upon the facts stated, the question whether the certificate and decree of the District Court were a defence was argued, and the Court decided that the certificate of reasonable cause could operate as a bar to an action only when the property was restored, according to the proviso in the statutes above referred to, and ordered judgment for the plaintiff on the verdict.

This case seems to be directly in point; and it was decided by judges of the highest character for learning and ability. It was, however, insisted by the attorney for the United States, who appeared for the defendant, that he should not be held responsible, by reason of the non-return of the property seized, for the following reasons, viz: First. The plaintiff has never made a demand upon the Collector for the return of the property. Second, The Collector did not have the possession of the property after the filing of the information; the Marshal took possession under the process of the Court. The Collector had no longer any control of the property, and was not liable therefor." And he cited (*Burke v. Trevitt*, 1 Mason 96. The *Maria*, &c., 4 Robinson Rep. 348. *Shattuck v. Maley*, 1 Wash. C. C. Rep. 245). He also insisted that "the plaintiff, failing to obtain possesion of his property, should have applied to the District Court, which has power to compel a redelivery of the property, or its value, into the possession of those who

may be entitled to it." And to maintain this position he cited (*Slocum v. Mayberry*, 2 Wheaton, 1. *Gelston v. Hoyt*, 3 Wheaton, 246, and *Burke v. Trevitt*, *ubi supra*).

The cases cited do not sustain these positions or weaken the authority of the case of *Hoyt v. Hook*. In the case of *Burke v. Trevitt*, there had been no information filed against the property in respect to which a recovery was claimed; and, of course, there was no certificate of probable cause. The owner of the property failed to recover because he failed to make out the trespass or taking alleged.

The case of *The Maria* was a case of capture as an alleged prize—*jure belli*—and, as has been before stated, such cases have no application to the present question. In the cases of *Shattuck vs. Maley*, and *Slocum v. Mayberry*, there had been no trial, or certificate of reasonable cause; and in *Gelston v. Hoyt*, there had been a trial but a certificate of reasonable cause had been refused by the District Court. In short, these authorities are not applicable to the present case.

It was, however, insisted that the property having been arrested by the Marshal, under the warrant of arrest, it was no longer in the custody of the defendant; that it was the duty of the Marshal to return the property; that if he failed to do so the plaintiff should have applied to the District Court to compel the Marshal to return the property; and that the defendant was not liable for the Marshal's default.

It is quite certain that it was not the duty of the Marshal to make return of the property to the claimant; and that the District Court could only require him to release the property from the arrest. But if it were the duty of the Marshal to make the return, and the court had power to require him to perform such duty, it would nevertheless be very doubtful, to say the very least, whether the Marshal's neglect of duty would not prevent the statute from operating as a protection to the defendant. The return of the property forthwith after judgment, is a condition precedent to the exemption from liability declared by the statute; and it is clear that it was the intention of Congress that a failure to make such return should fix the liability of the seizing officer. If the Marshal neglected his duty, to the injury of the seizing officer, the latter must seek his remedy against the Marshal; and if any application to the District Court was necessary to secure such return, it was the defendant's duty, and not that of the plaintiff, to take care that such application was made, in order to secure the protection of the statute.

But the Marshal had no such duty imposed upon him in this case; and the defendant was liable to the warehouseman for storage, for which the latter could probably retain the possession of the property—at least as against the defendant—and perhaps as against the plaintiff, and against the Marshal after the order or judgment of the District Court that the property should be discharged, and that there was reasonable cause for the seizure.

The plaintiff must have judgment upon the verdict.

CHURCH, MUNGER & COOKE,
For Plaintiff.

WM. DORSHEIMER,
U. S. Attorney for Deft.

POINT II.

The judgment of the Circuit Court should be affirmed with costs, or the writ of error be dismissed.

MARTIN W. COOKE,

Rochester, N.Y.,

For Defendant in Error.

ARGUMENT IN ANSWER TO POINTS OF PLAINTIFF IN ERROR.

It is claimed that the record does not show trespass by defendant.

1. The record in this suit is *sui generis*. The case, (pp. 9 to 19,) is not a part of it. (*Suydam v. Williamson*, 20 *How.*, 427, 438). It does not reserve any right to turn it into a special verdict, (p. 19). It was filed nearly two years after entry of judgment, (p. 19.) Thereafter, and on the 22d June, 1871, (see foot of p. 21), two years and a half after judgment, this "special verdict," (so called) was filed.

Upon this record the plaintiff in error seeks to reverse the judgment on a question never raised or suspected by the Judge or counsel in the court below. But it is submitted:

2. That the second point of the argument of the plaintiff in error is not well taken.

It appears by the said "special verdict" that the judgment of the District Court, in which said Smith was claimant, was rendered and *entered* on the 21st August, 1868, (p. 21.) On the 18th November, 1868, months after the entry of said judgmeut, the certificate of probable cause was granted, (p. 21, "special verdict.")

The argumeut is based upon the erroneous position that this certificate, made and entered months after the judgment in favor of the claimant, "threw the *onus probandi* upon the claimant," (p. 4, Points of Plaintiff in Error).

It would be a strange proceeding for a Court gravely to make a decision, after judgment entered in favor of a claimant, which should throw the *onus probandi* upon one of the parties in that suit.

But this *ex post facto* certificate can have no such magical effect as that claimed.

Its office was only designed to be a statutory bar to a common law suit against the officer seizing the goods adjudged to belong to the claimant. It would have been a complete protection to the officer and a bar to this suit but for the failure to comply with the proviso of the statute. Without the statute the certificate was nothing. With the statute it was nothing and of no effect whatever, unless the proviso was complied with. The learned Attorney General has not made any point against the argument of the learned Judge in his opinion in the Circuit Court.

The same argument that shows that the proviso of the statute, in view of the facts of this case, destroys the effect of the certificate as a bar, shows that the certificate was powerless to defeat the suit indirectly through its supposed redemptive effect upon the act of the defendant in seizing and carrying away the plaintiff's goods.

3. The cases cited by the plaintiff in error do not disturb the decision in this suit.

In this case the defendant, without process, seized, took and carried away plaintiff's property, (p. 20.) The cases cited, save one, were for acts of officers proceeding upon execution or process of the Court. In the case of *Gardner v. Campbell*, 15 *Johns*, 401, the defendant took plaintiff's goods under and by virtue of an execution, and it was decided, simply, that replevin would not lie. This case has no bearing except to show that plaintiff herein could not have replevied the goods if the position of plaintiff in error is correct.

In *Smith v. Eggleston*, 7 *Ad. & El.*, 167, and *Waterbury v. Lock*, 5 *Day*, 257, the defendant, an officer, was acting under process of the Court directing the seizure of the goods of defendant named in the process. The Court seized them. The case of *Jacobson v. Blake*, 6 *Man. & Gr.*, 918, 925, 926, 927, (cited by plaintiff in error), so far as it has any bearing, is against the position claimed. The officer there did not seize the goods, and it was upon this ground that the Judges decided the case. Tindal, C. J., says: "In order to maintain such an action (trespass) there must have been an actual seizure of plaintiff's goods." The goods were simply examined and returned. In the suit at bar they were seized, carried away, and never returned.

It is enough to require a citizen, when his goods have been seized and not forfeited, to come into Court and establish his title by judgment of the Court; and when this has been done, and the party who has committed the wrong is protected by a certificate of probable cause, it is little enough to require him to return the goods, or procure their return, and especially where they remain under his own personal control, as they did in this case.

MARTIN W. COOKE,

For Defendant in Error.